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# Supreme Court of the United States

October Term, 1962

No. 150

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES  
COMPANY, and MUNICIPAL SECURITIES COM-  
PANY, INC.,

*Petitioners,*

—v.—

NEW YORK STOCK EXCHANGE,

*Respondent.*

## REPLY FOR PETITIONERS

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## REPLY FOR PETITIONERS

Although the United States, petitioners and respondent all agree that the questions raised by the petition are important and far-reaching, respondent urges that certiorari be denied at this time. Apart from the issue of damages (Res. Br., 5-7), respondent ignores Question 2 of the Questions Presented (Pet., 2-3, 10-12, 14-15) and, focusing its opposition on Questions 1 and 3 (Res. Br., 2), alleges that consideration of these issues is premature (Res. Br., 2-5).

### I

This Court's consideration of the antitrust immunity issues presented by Questions 1 and 3 of the Questions Presented (Pet., 2-3) can in no way be aided by a district court hearing on the issue of arbitrary action. While the court below might have ordered a trial on this issue prior to granting the Exchange an absolute immunity from the antitrust laws on the facts as found by the district court

(Pet. App. A, 21, 30-31),<sup>1</sup> it did not do so. The Court of Appeals foreclosed further consideration by the district court of any antitrust issue (Pet. App. A, 21, 27, 30, 31), and as the *amicus* correctly points out, "it is far from clear that, apart from the antitrust laws, petitioners would be able to vindicate their rights".<sup>2</sup> Review by this Court now is therefore "fundamental to the future conduct of the case". *United States v. General Motors Corporation*, 323 U. S. 373, 377 (1945); *Land v. Dollar*, 330 U. S. 731, 734, ftn. 2 (1947); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685, ftn. 3 (1949); cf. *S. W. Sugar & Molasses Corp. v. River Terminals Corp.*, 360 U. S. 411, 414-415 (1959).

## II

Respondent's prematurity argument on damages (Res. Br., 5-7) does not warrant serious consideration by this Court.

In determining that petitioners had established the non-existence of any genuine issue as to the fact of "threatened loss or damage" under Section 16 of the Clayton Act, 15 U. S. C. § 26 (J. A. 160), the district court relied on (1) a statement by one of respondent's member-firms that private wire connections were available to most other broker-dealers who were members of the National Association of

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<sup>1</sup> The district court found that (1) the applicable provisions of the NYSE's constitution and rules "purport to confer upon the Exchange an absolute power to approve or disapprove all wire connections and ticker service with non-member firms and to require that such connections and services be discontinued in its absolute and uncontrolled discretion" (J. A. 134); (2) the "record fails to substantiate the charges against the Silvers" (J. A. 155); and (3) the conduct of the Exchange [could not] be justified by the denial of security clearance \* \* \*, nor by any of the other facts and circumstances upon which it relied" (J. A. 159).

<sup>2</sup> Brief for United States, *amicus curiae*, pp. 12-13.

Securities Dealers in Dallas (J. A. 152, 181); (2) respondent's concession that, prior to the time the private wires were withdrawn, petitioners were afforded an easier and more rapid means of communication with respondent's member-firms (J. A. 153, 160); and (3) the fact that petitioners incurred actual out-of-pocket expenses for substitute facilities (J. A. 96-97, 103-104, 198-199, 200-202). Since these facts were either conceded or undisputed, the district court concluded that the withdrawal of petitioner's private wires to NYSE member-firms "could not fail to injure the [petitioners'] business" (J. A. 160). The district court was clearly right. *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 461 (1945); *Bedford Cut Stone Co. v. Journeyman Stonecutters' Assn.*, 274 U. S. 37, 54-55 (1927); *Ring v. Spina* (S. D. N.Y.), 84 F. Supp. 403, 406, modified (2 Cir.), 186 F. 2d 637, certiorari denied, 341 U. S. 935 (1951).

### CONCLUSION

**By reason of the foregoing, the petition for a writ of certiorari should be granted.**

Respectfully submitted,

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